The George Washington University and Service Employees International Union, Local 500.[1] Case 5–CA–32568

December 28, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on July 5, 2005, the Acting General Counsel issued the complaint on July 29, 2005, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 5–RC–15715. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, with affirmative defenses, admitting in part and denying in part the allegations in the complaint.

On August 19, 2005, the Acting General Counsel filed a Motion for Summary Judgment. On August 23, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, and the Acting General Counsel filed a reply to the response.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contends that the Union's certification is invalid because challenged-ballot determinations in the underlying representation case significantly altered the composition of the unit.[2] Specifically, in its answer and response to the Notice to Show Cause, the Respondent contends that, by overruling challenges to the ballots of Amy Wind and Katherine Garrett,[3] the Board expanded the scope of the unit to include 20–30[4] other allegedly similarly situated individuals. The Respondent avers that these individuals, whose votes could have been determinative, were impermissibly disenfranchised because they were not included on the *Excelsior* list and therefore, presumably, did not receive mail ballots. The Respondent urges the Board to set aside the election and direct a second election.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Further, even assuming that the Respondent's contention regarding postelection changes in the composition of the unit has been properly raised in this proceeding, we find that the contention is without merit. Initially, we note that, contrary to the Respondent, the Board did not modify the unit after the election. The certified unit is exactly the same as the unit described in the Stipulated Election Agreement and notice of election.[5] Thus,

[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

[2] In addition to denying that the Union's certification was proper, the Respondent's answer also asserts as affirmative defenses that the complaint fails to state a claim on which relief can be granted and that the proceeding is barred by waiver, estoppel, and unclean hands. The Respondent has not offered any explanation or evidence to support these bare assertions. Thus, we find that these affirmative defenses are insufficient to warrant denial of the Acting General Counsel's Motion for Summary Judgment in this proceeding. See *Circus Circus Hotel*, 316 NLRB 1235 fn. 1 (1995).

[3] The Board agent challenged the ballots cast by Wind and Garrett on the basis that their names were not on the *Excelsior* list of eligible voters. *Excelsior Underwear*, 156 NLRB 1236 (1966).

[4] In its exceptions to the administrative law judge's report on challenges, the Respondent alleged that there were "at least" 20 other similarly situated individuals. In its response to the Notice to Show Cause, the Respondent contends that there are now 30 other similarly situated individuals.

[5] For this reason, *NLRB v. Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986), and *Hamilton Test Systems v. NLRB*, 743 F.2d 136 (2d Cir. 1984), cited by the Respondent, are inapposite. Those cases involved situations where the Board modified the unit after an election, resulting in a certified unit that differed significantly in character and/or scope from the unit described in the election notice.

Security '76/Division Of International Total Services, 272 NLRB 201 (1984) is also materially distinguishable. In that case, 23 percent of the mail ballots were returned to the Regional Office as undeliverable. The Board found that, in view of the significant number of ballots returned by the Postal Service, the Regional Office should have taken additional steps to increase the likelihood that eligible voters received ballots. Here, the Respondent alleges that 20–30 eligible employees, out of approximately 1217, may not have received mail ballots because they were excluded from the *Excelsior* list provided by the Respondent to the Regional Office. Thus, the percentage of eligible employees allegedly not receiving ballots in this case is under 2 percent. Moreover, there is no showing that the Regional Office was aware that these allegedly eligible employees existed prior to the hearing on challenged ballots.

stripped to its core, the Respondent's argument is that the election must be set aside because of the Respondent's failure to include allegedly eligible employees on the *Excelsior* list. Absent unusual circumstances not present here, however, an employer is estopped from relying on its own failure to comply with *Excelsior* requirements as a basis for setting aside an election. To hold otherwise would be to invite abuse. *Thiele Industries, Inc.*, 325 NLRB 1122 (1998). Accord *Berryfast, Inc.*, 265 NLRB 82 (1982) ("[w]here a party to an election, through its own action, negligence, or good-faith mistake, has prevented an eligible employee from voting, only the other, non-acting party has any foundation for an objection").[6]

In sum, we find that the Respondent has not raised any issue that is properly litigable in this unfair labor practice proceeding and, accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a private university with an office and place of business in the District of Columbia, has been engaged in providing higher education services.

During the 12-month period preceding issuance of the complaint, a representative period, the Respondent, in providing the services described above, derived gross revenues (excluding contributions which, because of limitations by the grantor, are not available for operating expenses) in excess of $1,000,000. In addition, it purchased and received at its District of Columbia facility products, goods, and materials valued in excess of $5,000 directly from points located outside the District of Columbia.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Service Employees International Union, Local 500 is a labor organization within the meaning of Section 2(5) of the Act.[7]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the secret-ballot election conducted by mail from October 4–19, 2004, the Union was certified on June 10, 2005,[8] as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All regular part-time faculty who receive pro-rated benefits and part-time faculty compensated per course without benefits, employed by the Employer, teaching at least one credit-earning class or lesson or lab, but excluding all other employees; all full-time faculty; all employees of the School of Medicine & Health Sciences; all pre-clinical and clinical medicine instructional faculty; all librarians; all employees based in the facilities of the Employer more than 30 miles from the main campus; all employees at the Hampton Roads facility; all lab assistants, graduate assistants, clinical fellows, teaching fellows, teaching assistants and research assistants who are not part-time faculty; all employees who teach only zero credit laboratory, discussion, or recitation sections; all administrators, registrars, managers and guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

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[6] See also *NLRB v. Berryfast, Inc.* 741 F.2d 1161, 1162 (9th Cir. 1984); *NLRB v. Triangle Express, Inc.*, 683 F.2d 337, 338-339 (10th Cir. 1982). In *Berryfast* and *Triangle Express*, the courts rejected challenges to a union's certification where, as here, allegedly eligible employees whose votes could have been determinative were excluded from the *Excelsior* list. In both cases, the courts emphasized that the employees whose names were omitted did not take reasonable steps to vote under challenge. Here, the Respondent has offered no reason why employees, who were allegedly similarly situated to Wind and Garrett, could not have voted by challenged ballot, as Wind and Garrett did. In this regard, we note that the Board's standard notice of election used for mail ballot elections directs individuals who believe they are eligible to vote and who did not receive a ballot in the mail to contact the Regional Office immediately. Employers are required to post this notice 3 full working days prior to an election at their primary business location and scattered bases of operation. See the Board's Casehandling Manual (Part II) Representation Proceedings, Secs. 11314 and 11336.3. See also Sec. 103.20 of the Board's Rules and Regulations. The Respondent does not suggest that it failed to post election notices or that eligible employees did not have an adequate opportunity to view the notices.

[7] The Respondent in its answer denies the conclusory allegations in paragraphs 2(d) and 3 of the complaint that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. However, the Respondent's answer admits the underlying factual allegations that, during the 12-month period preceding issuance of the complaint, the Respondent derived gross revenues in excess of $1,000,000, and purchased and received at its District of Columbia facility products, goods, and materials valued in excess of $5000 directly from points located outside the District of Columbia. These admissions are sufficient to establish that the Respondent is engaged in commerce. See *Siemons Mailing Service*, 122 NLRB 81 (1959). Further, in the underlying representation proceeding, the Respondent stipulated that it is an employer engaged in commerce and also effectively stipulated that the Union is a labor organization, within the meaning of the Act. Accordingly, we find that the Respondent's denials in its answer do not raise any issue warranting a hearing regarding these allegations. See, e.g., *Spruce Co.*, 321 NLRB 919 fn. 2 (1996), and cases cited there.

[8] On July 21, 2005, the Regional Director for Region 5 issued a Corrected Certification of Representative. The unit described herein is in accord with the Corrected Certification.

B. Refusal to Bargain

On or about June 29, 2005, the Union, by letter, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit.

Since on or June 29, 2005, the Respondent has failed and refused to recognize and bargain with the Union.[9] We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about June 29, 2005, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, The George Washington University, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Service Employees International Union, Local 500 as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All regular part-time faculty who receive pro-rated benefits and part-time faculty compensated per course without benefits, employed by the Employer, teaching at least one credit-earning class or lesson or lab, but excluding all other employees; all full-time faculty; all employees of the School of Medicine & Health Sciences; all pre-clinical and clinical medicine instructional faculty; all librarians; all employees based in the facilities of the Employer more than 30 miles from the main campus; all employees at the Hampton Roads facility; all lab assistants, graduate assistants, clinical fellows, teaching fellows, teaching assistants and research assistants who are not part-time faculty; all employees who teach only zero credit laboratory, discussion, or recitation sections; all administrators, registrars, managers and guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Washington, D.C. copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 29, 2005.

[9] The complaint also alleges, but the Respondent denies, that a named individual has at all material times been a supervisor and agent within the meaning of Sec. 2(11) and (13) of the Act, and that another unnamed individual has at all material times held the position of the Respondent's attorney and been an agent within the meaning of the Act. The Respondent's denials do not preclude summary judgment or raise material issues of fact warranting a hearing because the Respondent admits, in paragraph 9(b) of its answer, that it has refused to bargain with the Union.

[10] If this Order is enforced by a judgment of a United States Court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 28, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Service Employees International Union, Local 500 as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All regular part-time faculty who receive pro-rated benefits and part-time faculty compensated per course without benefits, employed by us, teaching at least one credit-earning class or lesson or lab, but excluding all other employees; all full-time faculty; all employees of the School of Medicine & Health Sciences; all preclinical and clinical medicine instructional faculty; all librarians; all employees based in our facilities more than 30 miles from the main campus; all employees at the Hampton Roads facility; all lab assistants, graduate assistants, clinical fellows, teaching fellows, teaching assistants and research assistants who are not part-time faculty; all employees who teach only zero credit laboratory, discussion, or recitation sections; all administrators, registrars, managers and guards and supervisors as defined in the Act.

THE GEORGE WASHINGTON UNIVERSITY